Supreme Court, U.S.
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No. 99 379

IN THE

Supreme Court of the United States

BARRY T. SULLIVAN,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit erred in substituting its own judgment for that of the jury, thereby overturning a $606,949 verdict and judgment for Petitioner, and expressly requiring proof of discrimination in addition to: (1) a *prima facie* case; and (2) the jury's rejection of the employer's proffered legitimate business reason in order for a plaintiff to prevail in a Title VII action, contrary to this Court's decision in *Hicks v. St. Mary's Honor Center* and the decisional law of the Third, Sixth, Seventh, Tenth, and District of Columbia Circuits.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit is reported at *Sullivan v. National Railroad Passenger Corporation*, 170 F.3d 1056 (11th Cir. 1999) (App. A). The order and final judgment of the United States District Court for the Southern District of Florida is unreported (App. B).

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari is based upon the United States Court of Appeals for the Eleventh Circuit's decision overturning a jury verdict and judgment in the amount of $606,949 in favor of Petitioner Barry T. Sullivan, in which the Eleventh Circuit substituted its own judgment for that of the jury and expressly required proof of discrimination in addition to: (1) Petitioner's *prima facie* case; and (2) the jury's rejection of the Respondent employer's proffered legitimate business reason for its adverse employment action before Petitioner could prevail. The Eleventh Circuit's decision was rendered on March 26, 1999 (App. A). Petitioner timely filed a Petition for Rehearing and Rehearing *En Banc*, which was denied by the Eleventh Circuit on June 3rd, 1999 (App. D).

This Court has certiorari jurisdiction pursuant to 28 U.S.C. § 1254(1). Certiorari is particularly appropriate where, as here, the United States Courts of Appeals are split on the issue presented.

STATUTORY PROVISIONS INVOLVED

The statute involved in this case is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), which provides as follows:

> It shall be an unlawful employment practice for an employer —
>
> (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex. . . .

42 U.S.C. § 2000e-3 provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari arises out of a lawsuit brought by Petitioner Barry T. Sullivan against the Respondent National Railroad Passenger Corporation ("Amtrak"), based on gender discrimination in the form of *quid pro quo* sexual harassment by a male supervisor and retaliation, both pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Jurisdiction was based upon 28 U.S.C. § 1331.

Petitioner's claim stemmed from an incident in December 1993 when Sullivan's immediate supervisor, Kevin Scott, allegedly sexually propositioned him in a hotel parking garage (App. A at 2a).[1] Sullivan did not report this incident to anyone at Amtrak until February 1994, after he had been demoted from his job as manager during a corporate reorganization. In approximately February 1994, Sullivan's attorney lodged a complaint with Amtrak on Sullivan's behalf, claiming that the incident with Scott in December 1993 constituted unlawful sexual harassment (App. A at 3a). Amtrak officials investigated the complaint and concluded that the incident had not in fact occurred (App. A at 3a). In June 1994, Scott changed Sullivan's work schedule from four to five days per week (App. A at 3a). Amtrak claimed that this change was necessary to satisfy a Food & Drug Administration ("FDA") regulation that all inbound trains be inspected and cleaned upon arrival (App. A at 3a). In July 1994, Amtrak, through a committee on which Scott sat, eliminated Sullivan's yard chief position (App. A at 3a). Throughout 1995, Sullivan unsuccessfully applied for a number of different management positions including: Director of OBS Station Support (January, 1995); Product Line Director (March, 1995); Manager of Terminal Services, Miami (March, 1995); Manager of Terminal Services, New Orleans (May, 1995); Conventional Services Manager, Northeast Corridor (April, 1995) (App. A at 3a-4a).

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1. The facts presented are derived from the appellate court's opinion, supplemented with additional record evidence. "App." references are to the Appendix materials attached hereto. "Tr." references are to the trial transcript. "R." references are to the certified Record on Appeal transmitted to the Eleventh Circuit from the district court. The first numeral is to the volume; the second to the docket number; and the third to the page numbers within the document, if applicable.

Sullivan filed suit against Amtrak in February 1995, and amended his complaint in June 1995 to include charges that Amtrak had retaliated against him by, *inter alia*, rejecting him for all of the other management positions for which he applied (App. A at 4a).

The case was tried to a jury in May 1997. The jury returned a verdict finding for Amtrak on the underlying claim of sexual harassment, but finding for Sullivan on the retaliation claim (App. C at 24a). Following the jury's verdict granting judgment for Sullivan and $60,000 in compensatory damages, the trial court held a hearing on the matter of equitable damages and issued a final judgment in the amount of $606,949 which included the compensatory damages awarded by the jury, plus back pay and front pay in lieu of reinstatement (App. B at 21a-22a). Amtrak took an appeal from that judgment, and, following oral argument, the United States Court of Appeals for the Eleventh Circuit reversed the jury's verdict (App. A at 12a).

In reversing the jury verdict for Sullivan on the retaliation claim, the court of appeals impermissibly substituted its judgment of the evidence for that of the jury. Thus, with regard to the product line director position, the court of appeals found that there was no evidence in the record to rebut the "decisionmaker" Al Edelston's testimony that he did not know of Sullivan's complaint or to show that Amtrak's reasons for hiring Dennis Hale instead were pretextual. However, there is ample evidence in the record to "rebut" Edelston's testimony. Indeed, right after he heard about Sullivan's allegation from Amtrak's legal counsel, Joanna Moorehead, Kevin Scott personally told Edelston

about it (R. 12-158-70-72).[2] Moreover, Edelston himself testified that the decision whether to grant someone an interview for the position was made only after consultation with John Stafford, Amtrak's Director of Human Resources, who admittedly was acutely aware of Sullivan's claim against Scott (R. 9-146-150-151; R. 11-157-44). In fact, Edelston testified that Stafford was helpful in making the decision as to whom to interview for the product line director position (R. 11-157-44). Additionally, Sullivan presented substantial evidence with which the jury could compare the qualifications of Sullivan with those of Hale in an effort to determine whether Amtrak's explanation that Hale was the better qualified for the product line director position was in fact believable (Tr. 5/27-120-122).

With regard to the manager of terminal services position (New Orleans), for which James Turngren was hired over Sullivan, the court of appeals did not, nor could it, question the fact that the decisionmaker, Charles Bothwell, was aware of Sullivan's complaint (R. 12-158-72). Significantly, the court even acknowledged that Bothwell provided no direct testimony as to why Turngren got the job over Sullivan. In addition, Stafford testified that Turngren's former position just prior to his selection as manager of terminal services was lower than the original district manager position from which Amtrak had demoted Sullivan in January 1994 (R. 9-146-134). Significantly, Stafford was again instrumental in the process of deciding who was going to get interviewed for the position, actually interviewing, helping sift through the candidates, and deciding who should ultimately be selected (R. 11-157-63). With regard to the

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2. The record reflects Mr. Edelston's first name incorrectly as "Stan" (R. 12-158-72).

position for which Amtrak promoted Scott Weddle, Stafford testified that it was he who made the hiring recommendation (R. 9-146-136).

Despite all of the foregoing evidence, however, the Eleventh Circuit simply concluded: "[Sullivan] failed to introduce any evidence that would have permitted the jury to legitimately draw the inference that the reasons proffered by Amtrak for Sullivan not getting these jobs were false **and that the real reason was retaliation** [emphasis added]" (App. A at 12a).

The court of appeals, in so holding, essentially deprived the jury of its role as the finders of fact, with the ability to infer unlawful retaliatory discrimination from its rejection of Amtrak's proffered reasons for its failure to promote Sullivan, in clear conflict with this Court's holding in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), and the decisional law of the Third, Sixth, Seventh and District of Columbia Circuits, as well as the prior decisional law of the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

To establish a *prima facie* case of employment discrimination/retaliation pursuant to Title VII, particularly where the evidence, as in the instant case, is circumstantial, the plaintiff must satisfy the by now familiar requirements of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which allocates the burdens of production and proof as follows: The plaintiff must first establish by a preponderance of the evidence a *prima facie* case of discrimination, which itself is a fluid standard not subject to rigid interpretation but highly individualized to the particular facts of any given

case.[3] Once the plaintiff has met the burden of establishing his *prima facie* case, the burden of production shifts to the defendant to evidence a non-discriminatory reason for its adverse employment actions. This Court, in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), held in no uncertain terms that once the defendant satisfies that burden of production, the presumption of discrimination established with the evidencing of the *prima facie* case is no longer required and therefore drops out; instead, the plaintiff must prove that the employer's proffered non-discriminatory reason is a pretext.

In further clarifying the *McDonnell Douglas* analysis, this Court stated in *Hicks*, 509 U.S. at 510 [emphasis added]:

> The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" . . . [citation omitted]. **The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the**

3. In a classic retaliation case, the elements are: (1) that plaintiff engaged in protected expression; i.e., he reasonably and in good faith complained of what he perceived to be an unlawful employment practice; (2) adverse employment action was taken against him, i.e., failure to promote to a management slot for which he was qualified, eliminating his job, or subjecting him to more onerous working conditions; and (3) that the two are not causally unrelated. (App. A at 6a); *Olmstead v. Taco Bell Corp.*, 141 F.3d 1457, 1460 (11th Cir. 1998); *Raney v. Vincent Guard Service*, 120 F.3d 1192, 1196 (11th Cir. 1997).

> **elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, [footnote omitted] and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*".** . . . [citation omitted] [emphasis in original].

The Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have all faithfully followed this Court's holding in *Hicks* that a jury's finding the reasons articulated for a challenged employment action unworthy of credence, coupled with the *prima facie* case, is "enough at law to sustain a finding of [intentional] discrimination." 509 U.S. at 511 n.4. While such a finding is not *compelled*,[4] these Circuits recognize that it is a question "for the factfinder to answer" whether the employer's assertion of a non-credible reason is a cover-up for illegal discrimination. *Id.* at 523-24.

These Circuits have therefore uniformly held that a Title VII plaintiff can prevail if, together with his *prima facie* case, he shows that the employer's proffered legitimate, non-discriminatory reason for its adverse employment action was simply pretextual. A plaintiff can establish pretext, and thus permit the jury to infer discrimination without additional proof, directly by persuading the trier of fact that a discriminatory reason more likely motivated the employer, **or indirectly by showing that the employer's proffered**

4. The four dissenting Justices in *Hicks* would have gone further and held that rejection of the employer's reasons does not merely permit but *compels* a finding of discrimination. *Hicks*, 509 U.S. at 525-43 (Souter, J., dissenting).

explanation is simply unworthy of belief. *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (*en banc*), *cert. denied*, __ U.S. __, 117 S. Ct. 2532 (1997) (plaintiff may succeed in proving pretext and have jury decide ultimate question of liability by persuading jury directly that discriminatory reason more likely motivated employer or indirectly by showing that employer's proffered explanation is unworthy of belief); *Barnett v. Dept. of Veterans Affairs*, 153 F.3d 338, 341-342 and 342 n.4 (6th Cir. 1998) (citing *Hicks*) (rejection of employer's proffered legitimate reason will permit factfinder to infer ultimate fact of intentional discrimination without requirement of additional proof of discrimination); *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1227 (6th Cir. 1996) (evidence of pretext presented by plaintiff sufficient to permit reasonable factfinder to infer that employer engaged in discriminatory conduct); *Essex v. United Parcel Service, Inc.*, 111 F.3d 1304, 1310 (7th Cir. 1997) (plaintiff can prove pretext either by presenting direct evidence that discriminatory reason motivated employer's decision or by presenting indirect evidence that employer's proffered reason is unworthy of credence, raising inference that real reason is discriminatory); *Edwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998) (plaintiff may prove pretext with circumstantial evidence tending to show that employer's proffered motives were not actual motives because they are inconsistent or otherwise not believable); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1997) (to establish pretext, plaintiff must provide enough evidence to allow reasonable factfinder to conclude either: (a) that alleged reason for discharge was false; or (b) that the true reason for discharge was discriminatory one); *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1103 (10th Cir. 1998) (*prima facie* case plus indirect showing of retaliation by

demonstrating that employer's asserted reasons for adverse action are unworthy of belief sufficient to establish retaliation); *Randle v. City of Aurora*, 69 F.3d 441, 452-53 n.17 (10th Cir. 1995) ("the *en banc* court has unanimously adopted this panel's holding that a civil rights plaintiff may withstand a motion for summary judgment . . . if [he] establishes a prima facie case and presents evidence that the defendant's proffered nondiscriminatory reason is pretextual — *i.e.*, unworthy of belief");*Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997) (holding that defendant who puts forward only reasons that are subject to reasonable disbelief in light of evidence faces having its true motive determined by jury, whose factfinding role should not be preempted by court in determining whether to draw inference of intentional discrimination from plaintiff's *prima facie* case taken together with its rejection of employer's proffered explanation for its action);[5] *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1999) (*en banc*) (rejecting any reading of *Hicks* under which employment discrimination plaintiff would be routinely required to submit evidence over and above rebutting employer's stated explanation in order to get to a jury, as such would be inconsistent with *Hicks*, which makes clear that

5. As shown by its opinion in the instant case, the Eleventh Circuit has been, at best, internally split on this issue. *Compare Combs* with *Isenbergh v. Knight-Rider Newspaper Sales, Inc.*, 94 F.3d 436, 444 (11th Cir. 1996) (some cases will require plaintiff to present evidence in addition to *prima facie* case and "disbelievability" of employer's proffered reason for employment discrimination). *Combs* specifically disavowed the prior holding in *Isenbergh*, and the Eleventh Circuit's post-*Combs* decisions have followed the *Combs* analysis. *See, e.g., Bogle v. Orange County Board of County Commissioners*, 162 F.3d 653 (11th Cir. 1998); *Walker v. Mortham*, 158 F.3d 1177 (11th Cir. 1998); *Arrington v. Cobb County*, 139 F.3d 865 (11th Cir. 1998).

"no additional proof of discrimination is required" as a matter of course once a plaintiff has shown that a jury could reject employer's proffered explanation; factfinder's disbelief of reasons put forward by defendant will allow it to infer intentional discrimination).

On the other hand, the First, Second, Fourth, and Eighth Circuits, have, like the Eleventh Circuit in the instant case, affirmatively required a Title VII plaintiff to prove "pretext plus"; that is, in order to prevail, these courts require a Title VII plaintiff to present both evidence of pretext (whether direct or indirect) ***plus*** additional specific evidence that the employer's true motive was discriminatory. This "pretext plus" approach does not permit a trier of fact to infer discrimination from indirect evidence of pretext, such as disbelief of the employer's proffered legitimate business reason, but rather, requires a plaintiff to not only discredit the employer's proffered reason or show that the real reason was more likely discriminatory (plain pretext), but, in addition, affirmatively to produce specific evidence to prove discriminatory animus. *Hidalgo v. Condado Insurance Agencies, Inc.*, 120 F.3d 328, 337 (1st Cir. 1997) (following pure "pretext plus" position, requiring both evidence of pretext and other "significantly probative" evidence of discrimination); *Fisher v. Vassar College*, 114 F.3d 1332, 1343 (2d Cir. 1997) (*en banc*) ("a *prima facie* case plus a finding of pretext is [not] necessarily sufficient to sustain a plaintiff's burden"), *cert. denied*, 118 S. Ct. 851 (1998); *Gillins v. Berkeley Electric Cooperative, Inc.*, 148 F.3d 413, 415-416 (4th Cir. 1998) (once employer comes forward with legitimate reason for adverse employment action, burden shifts back to plaintiff to demonstrate that employer's reason was pretextual **and** motivated in fact by discriminatory purpose); *Vaughan v. Metrahealth Companies, Inc.*, 145 F.3d

197, 202 (4th Cir. 1998) (expressly adopting "pretext plus" approach); *Ryther v. KARE 11*, 108 F.3d 832, 837 (8th Cir. 1997) (*en banc*) (plaintiff's proof of *prima facie* case accompanied by evidence of pretext and disbelief of defendant's proffered explanation may permit jury to find for plaintiff provided that plaintiff still persuades jury from all facts and circumstances that an employment decision was based upon intentional discrimination).

The focus of this Court's opinion in *Hicks*, and the issue on which Petitioner seeks certiorari here, is the plaintiff's ultimate burden of proof following proof of his *prima facie* case and the employer's opposing introduction of a legitimate business reason for its adverse employment action against the plaintiff, which is the employer's medial burden required under the *McDonnell Douglas* analysis. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). The employer's medial burden was further described by this Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 and n.8 (1981), where the Court held that the employer, in order to meet its burden, had to clearly set forth, through the introduction of admissible evidence, reasons for its actions which, **if believed by the trier of fact**, would support a finding that unlawful discrimination was not the reason for the adverse employment action. Obviously, the Circuit Courts of Appeals are hopelessly split as to the correct meaning and application of this Court's subsequent decision in *Hicks*, and the type and quantum of evidence which the plaintiff in a Title VII case must produce in order to counter the employer's satisfaction of its medial burden and ultimately prevail. Petitioner here submits that this Court should grant certiorari to definitively resolve this issue, which is a crucial and integral part of a Title VII analysis in an indirect evidence case.

This Court made it clear in *Hicks* that a Title VII plaintiff could defeat the employer's defensive showing by direct evidence, or by inference, such as convincing the trier of fact that the employer's proffered reason is simply unworthy of belief. The trier of fact's rejection of the employer's reason, the Court made clear, could, together with the elements of the plaintiff's *prima facie* case, suffice to permit, although not require, the jury to infer intentional discrimination, requiring no additional proof of discrimination. *Hicks*, *supra*, 509 U.S. at 511. In any event, once the plaintiff has come forward with such evidence, the question is exclusively one for the trier of fact, and not the court. This view is consistent with the Equal Employment Opportunity Commission's enforcement guidance, which states: "a prima facie case, coupled with a non-credible justification from the employer, is sufficient to support a finding of discrimination." EEOC: Enforcement Guidance on *St. Mary's Honor Center v. Hicks*, 8 FEP Manual (BNA) 405:7175, 7175.

Despite this Court's clear language in *Hicks*, the Eleventh Circuit's decision in the instant case held: "[Sullivan] failed to introduce any evidence that would have permitted the jury to legitimately draw the inference that the reasons proffered by Amtrak for Sullivan not getting these jobs were false ***and*** that the real reason was retaliation" (App. A at 12a). In this respect, the instant decision aligns the Eleventh Circuit once again with those circuits requiring a Title VII plaintiff to prove "pretext plus" in order to prevail, and thus deprives the jury of the ability to draw an inference of discrimination from its disbelief of the plaintiff's proffered evidence of pretext.

Those courts which endorse the "pretext plus" approach essentially hold that in some but not all cases, the *prima facie* case **plus** pretext suffices to make a triable issue of discrimination. *See, e.g., Fisher v. Vassar College, supra*, 114 F.3d at 1343; *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*) ("In tandem with a *prima facie* case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually [but not always], permit a finding of discrimination without additional evidence.").[6] Presumably, this notion is based on one permissive statement in the *Hicks* decision: "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.* (quoting *Hicks, supra*, 509 U.S. at 511). That sentence, standing alone, may indeed be susceptible to such a reading. When the sentence is read in context, however, it can only mean that the trier of fact always may, but never must, draw an inference of illegal discrimination based solely on the *prima facie* case and a finding of pretext. Specifically, immediately after the cited sentence, the Court states, "rejection of the defendant's proffered reasons **will** permit the trier of fact to infer the ultimate fact of intentional discrimination," adding that such rejection "is enough at law to sustain a finding of discrimination." *Hicks, supra*, 509 U.S. at 511 & n.4 (emphasis added and omitted). The Court then continues,

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6. Even the Fifth Circuit has reached a contrary conclusion in its history, holding that a Title VII plaintiff could establish circumstantial evidence of intentional discrimination by demonstrating that employer's proffered legitimate reason was pretextual, either by showing that a discriminatory motive more likely motivated the employer or that the employer's explanation was unworthy of belief. *Harrington v. Harris*, 118 F.3d 359, 367-368 (5th Cir. 1997).

"upon such rejection, '[n]o additional proof of discrimination is required.' " *Id.* at 511 (emphasis omitted). The Court's use of the phrases "will permit" and "is enough at law to sustain," without qualification, coupled with its declaration that "no additional proof of discrimination is required," belies any notion that such evidence will suffice in only certain limited cases.[7]

The proponents of the "pretext plus" approach have also expressed concern that, unless evidence beyond the *prima facie* case and pretext is required, a plaintiff will be able to get to a jury without any evidence that the employer's true reasons were discriminatory. *Fisher v. Vasser College*, 114 F.3d at 1346. In *Fisher*, the Second Circuit suggested that proof that the employer's proffered reason is pretextual is simply one element of the plaintiff's overall burden of proof; he must then come up with additional evidence that the true reason is discriminatory.[8] This suggestion stemmed from the

7. There may be some rare cases where a plaintiff cannot get to the jury despite raising a triable issue of fact as to pretext. Specifically, where unrebutted evidence or an admission by the plaintiff establishes that the decision was based on a third reason, inconsistent with a finding of discrimination, summary judgment might be appropriate. Thus, for example, in *MacDonald v. Eastern Wyoming Mental Health Center*, 941 F.2d 1115, 1121-22 (10th Cir. 1991), the Tenth Circuit granted summary judgment in an age discrimination suit even though the plaintiff's evidence showed that the reasons given for their terminations were pretextual because the complaint itself alleged that the true reason for the terminations was not age but rather the fact that they had spoken out in opposition to the Center's alleged unethical practices. *Id.*

8. A related issue is whether certain types of pretext evidence are "more probative" of discrimination than others. However, no

(Cont'd)

court's fear that because discrimination is only one of many possible reasons why an employer might give false explanations for employment decisions, without "evidence that illegal discrimination is present," a jury could only speculate as to the employer's true motivation.[9]

What the *Fisher* court, the Eleventh Circuit in the case at bar, and the whole "pretext plus" position overlooks is that a jury may always find powerful — even conclusive — evidence that illegal discrimination is present if it finds that the employer gave a false explanation for the challenged employment decision "particularly if disbelief is accompanied by a suspicion of mendacity": in such a case, "no additional proof of discrimination is required." *Hicks*, *supra*, 509 U.S. at 510-511.[10]

(Cont'd)
particular type of evidence is, or should be, required to withstand having the jury's factfinding authority usurped by the court. *See Sheridan*, *supra*, 100 F.3d 1061 (reversing panel decision holding that pretext must be established using one of four types of evidence). The *McDonnell Douglas* framework is based on a recognition that direct evidence of motivation is normally unavailable. Because each case is different, therefore, the plaintiff should be able to rely on *any* evidence which undermines the proffered reason and would permit the trier of fact to conclude that it is unworthy of credence.

9. Indeed, the Eleventh Circuit in the instant case held that the jury's inference of discrimination from the evidence presented was "too speculative" to stand. In determining itself that the evidence did not support such an inference, however, the Eleventh Circuit was itself engaging not only in speculation, but in blatant impermissible substitution of its own credibility determinations from those of the jury.

10. The *Fisher* court recognized that its ruling is at odds with the statement in *Hicks* that "no additional proof of discrimination is required." *See* 114 F.3d at 1343. The court stated, however, that, in
(Cont'd)

As then-Justice Rehnquist has explained, "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is *more likely than not* the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race [or retaliation or gender]." *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978) (emphasis added). "If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age [or gender or retaliation], may rationally be drawn. This is the common sense behind the rule of *McDonnell Douglas*." *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990); *accord Sheridan*, *supra*, 100 F.3d at 1068-72; *Combs*, *supra*, 106 F.3d at 1538 (an employer who puts forward only reasons subject to reasonable disbelief in light of the evidence faces having its true motive determined by the jury, whose province of drawing an inference of discrimination in such circumstances should not have its role usurped by the court). *See also Hicks*, *supra*, 509 U.S. at 511 ("rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination").

(Cont'd)
making this statement, the Supreme Court was referring only to "procedure"; the plaintiff, procedurally, need not produce additional evidence. *See id.* This interpretation makes no sense since the *Hicks* Court was not addressing "procedure" but rather whether a finding of discrimination was compelled or simply permitted by the *prima facie* case and finding of pretext. *See* 509 U.S. at 511. The interpretation also utterly fails to explain the *Hicks* Court's preceding statements that rejection of the employer's reasons "*will* permit" — and "*is* enough at law to sustain" — a finding of discrimination. *Id.* at 511 & n.4 (emphasis added).

The *Hicks* Court thus made clear that, because such an inference is reasonable, a finder of fact may always infer discrimination if it finds the proffered reason unworthy of credence, as it obviously did here.

The Eleventh's Circuit's decision in the instant case completely disregards the fact that the jury rejected Amtrak's proffered reasons for not promoting Sullivan in favor of Sullivan's evidence against that reason, either because the jury found that the real reason was retaliation or because Sullivan's evidence caused them to disbelieve Amtrak's given reason. If the jury disbelieved Amtrak's reason in light of the evidence, it was permitted to draw the inference that Amtrak refused to promote Sullivan to jobs for which he was clearly qualified in retaliation for his having legitimately and in good faith complained about what he perceived as unlawful sexual harassment, in violation of Title VII. In either case, that judgment was solely the province of the jury to make in light of the evidence presented.

CONCLUSION

For the foregoing reasons, Petitioner Barry T. Sullivan respectfully requests that this Honorable Court grant a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, as such is necessary to resolve the conflict between the Eleventh Circuit's decision in the instant case and this Court's decision in *St. Mary's Honor Center v. Hicks*, as well as the governing decisional law of the Third, Sixth, Seventh, Ninth, and District of Columbia Circuits.

Respectfully submitted,

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APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED MARCH 25, 1999, ENTERED AND FILED MARCH 26, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4080

D.C. Docket No. 95-0037-CIV-DLG

BARRY T. SULLIVAN,

Plaintiff-Appellee,

versus

NATIONAL RAILROAD PASSENGER CORPORATION, a foreign corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(March 25, 1999)

Before COX and BARKETT, Circuit Judges, and FAY, Senior Circuit Judge.

BARKETT, Circuit Judge:

National Railroad Passenger Corporation ("Amtrak") appeals a final judgment following a jury verdict in favor of

Appendix A

Barry T. Sullivan on his claim of unlawful retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et. seq.* ("Title VII"), the Civil Rights Act of 1991, 42 U.S.C. § 1981(a) and the Florida Whistleblower's Protection Act, Fla. Stat. Ann. § 448.102(3) (West 1998). Amtrak argues that the district court should have granted its motion for judgment as a matter of law or, in the alternative, for a new trial. We reverse.

Background

In 1995, Barry Sullivan sued Amtrak, claiming that he was the victim of sexual harassment and retaliation stemming from an incident in December 1993 when Sullivan's immediate supervisor, Kevin Scott, allegedly sexually propositioned him in a hotel parking garage. Sullivan claims that the incident occurred while the two were traveling on business and staying at a hotel in Tampa, Florida. According to Sullivan, when Sullivan accompanied Scott to the hotel parking garage to retrieve Scott's briefcase from the car, Scott suggested that Sullivan accompany him to Scott's room for a short while, and that Sullivan would not regret it. Sullivan claimed he slammed Scott to the trunk of the car, causing Scott to lose his glasses. As Scott retrieved his glasses from the ground, he apologized profusely to Sullivan, asking him to forget about the incident and assuring him that it would not happen again. According to Sullivan, Scott further assured him that he would have nothing to worry about for as long as the two continued to work together. Sullivan did not report this incident to anyone at Amtrak until February 1994, after he had been demoted from his job as manager.

Appendix A

Sullivan's demotion occurred on January 26, 1994, when Scott hand-delivered a letter to Sullivan informing him that his management job as District Manager of the Miami Station had been eliminated as part of Amtrak's nationwide reorganization. This led to Sullivan's taking the non-managerial position of Yard Chief of the Miami Station. On February 11, 1994, Amtrak began an investigation into the whereabouts of fifteen missing Publix gift certificates as well as a cellular phone that had been in Sullivan's care. Shortly thereafter, Sullivan returned eight of the gift certificates and the phone. He could not account for the missing eight certificates, which were cashed at a grocery store near his home. He also admitted to making, along with his wife, over one thousand dollars worth of unauthorized calls on the company phone. Amtrak took no formal action against Sullivan regarding either the phone or the gift certificates.

On approximately February 15, 1994, Sullivan's attorney lodged a complaint with Amtrak on Sullivan's behalf, claiming that the incident with Scott in December 1993 constituted sexual harassment. Amtrak officials investigated the complaint and concluded that the incident had not in fact occurred. In June 1994, Sullivan's work schedule was changed from four to five days a week. Amtrak claims that this change was necessary to satisfy a Food and Drug Administration (FDA) regulation that all inbound trains be inspected and cleaned upon arrival. In July 1994, Amtrak eliminated all Yard Chief positions nationwide. Sullivan then took the lesser position of Chief of On Board Service. Throughout 1995, Sullivan unsuccessfully applied for a number of different management positions including: Director of OBS Station Support (January 1995); Product

Line Director (March 1995); Manager of Terminal Services, Miami (March 1995); Manager of Terminal Services, New Orleans (May 1995); Conventional Services Manager, Northeast Corridor (April 1995).

Sullivan filed suit against Amtrak in February 1995, claiming that the incident with Scott in December 1994 constituted sexual harassment. Sullivan amended his complaint in June 1995 to include charges that Amtrak had retaliated against him by: 1) investigating his involvement with the misuse of a company cellular telephone and the theft of fifteen Publix gift certificates; 2) changing the job description of Sullivan's job as Yard Chief and then eventually eliminating the position, and; 3) after eliminating the position, failing to hire him for any of the other management positions for which he applied.

The jury found against Sullivan on his claims of sexual harassment and Sullivan has not appealed from the judgment on that claim. However, the jury found for Sullivan on his claims of retaliation, awarding him $50,000 in compensatory damages. Following the trial, the magistrate judge held an evidentiary hearing and awarded Sullivan equitable damages in the amount of $98,783 in backpay, with pre-judgment and post-judgment interest calculated at 6.5%, and front pay in the amount of $458,166.

On appeal, Amtrak argues that the district court erred by not granting Amtrak judgment as a matter of law or, alternatively, a new trial because: 1) the jury found against Sullivan on his sexual harassment claim and therefore could not reasonably find for Sullivan on his retaliation claim; and

2) there was no evidence of retaliation. Amtrak additionally claims that the damage amounts awarded by both the jury and the magistrate judge were not supported by the evidence.

Discussion

We first address Amtrak's claim that, as a matter of law, the jury could not find against Sullivan on his sexual harassment claim while finding for him on the retaliation claim.[1] Amtrak argues that Sullivan's harassment claim is based on a single incident which Amtrak maintains never occurred. Because the jury found for Amtrak on the sexual harassment claim, Amtrak asserts, the jury must have accepted Amtrak's contention that the incident never happened. Consequently, Amtrak argues, Sullivan's claim of retaliation cannot stand because it requires a good faith, objectively reasonable belief that the discrimination occurred. *See Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1998).

We find this argument totally meritless. The fact that the jury concluded that Sullivan's claim did not meet all the elements for a successful sexual harassment action does not mean that it could not have found that the incident did take place and that Sullivan could have reasonably believed himself the victim of sexual harassment. For example, the jury could well have determined that the incident occurred but did not rise to the level of harassment prohibited by Title

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1. We review the district court's denial of Amtrak's motion for judgment as a matter of law *de novo*. *See Daniel v. City of Tampa, Fla.*, 38 F.3d 546, 549 (11th Cir. 1994).

VII. Courts may not reach behind jury verdicts to evaluate their reasoning. *See, e.g., U.S. v. Russo*, 796 F.2d 1443, 1450 (11th Cir. 1986) (court will not look behind verdict for evidence of jury confusion); *Delpit v. Nocuba Shipping Co.*, 302 F.2d 835, 838 (5th Cir. 1962) ("We may not second-guess jurors or substitute our judgment for theirs when theirs is supported by sufficient evidence."); *Vera-Lozano v. International Broadcasting*, 50 F.3d 67, 71 (1st Cir. 1995) (court will not supplant the jury verdict nor second-guess what may have been their thought process). Moreover, retaliation is a separate offense under Title VII; an employee need not prove the underlying claim of discrimination for the retaliation claim to succeed. *Meeks v. Computer Associates Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994); *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1494 (11th Cir. 1989).

Turning to the question of whether there is sufficient evidence to support Sullivan's claim of retaliation, however, we find Amtrak's appeal meritorious. To make a prima facie case for retaliation, the plaintiff must show: 1) a statutorily protected expression; 2) an adverse employment action; 3) a causal link between the protected expression and the adverse action. *See Olmsted v. Taco Bell Corp.*, 141 F.3d 1457, 1460 (11th Cir. 1998); *Raney v. Vinson Guard Service*, 120 F.3d 1192, 1196 (11th Cir. 1997).[2] Once theplaintiff makes out a prima facie case, "the burden shifts to the defendant to rebut the presumption of retaliation by producing legitimate

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2. The district court instructed the jury to apply this test for both Sullivan's state and federal retaliation claims. Neither party has disputed that instruction. Consequently, we follow the same procedure.

reasons for the adverse employment action." *Raney*, 120 F.3d at 1196 (quoting *Hairston v. Gainesville Sun Publishing Co.* 9 F.3d 913, 919 (11th Cir. 1993)). If the defendant offers legitimate reasons, the presumption of retaliation disappears. *Id.* The plaintiff must then show that the employer's proffered reasons for taking the adverse action were actually a pretext for prohibited retaliatory conduct. *Olmsted*, 141 F.3d at 1460.

There is no dispute that Sullivan's complaint to Amtrak's management that he had been sexually harassed constituted protected expression nor that Sullivan suffered adverse employment actions. The only issue to be addressed here is whether a causal link existed between the adverse employment action and the protected expression.

While Sullivan initially included in his complaint as adverse employment actions his first demotion and the investigation into the gift certificates and cellular phone, he concedes that these cannot be considered retaliatory actions because they predate the protected expression. Thus, the only question before us is whether a causal link exists between Sullivan's sexual harassment complaint and the change in his work hours, the subsequent elimination of his job, and Amtrak's failure to rehire him.

Although Sullivan argues that the change in his work hours as Yard Chief and the subsequent elimination of the position were retaliatory actions taken directly by Scott, he offers no evidence to refute Amtrak's contentions that the change in hours was a response to an FDA requirement and that the job's subsequent elimination (along with all other Yard Chief positions) was part of a nationwide restructuring.

Appendix A

Absent evidence suggesting that Amtrak's reasons for changing the Yard Chief's hours and then eliminating the position were pretextual, Sullivan's retaliation claim arising from this action must fail.

Sullivan next claims that Amtrak failed to rehire him to a management position for retaliatory reasons. He argues that he was more qualified than the successful applicants for all of the management positions for which he applied, and that in each case he was denied the position by someone who had some tie to Scott or who knew of his sexual harassment complaint. In each case, however, there is insufficient evidence to support a conclusion that Sullivan was not hired for retaliatory reasons.

First, according to Sullivan, he should have received the position of Director of OBS Station Support because the job's responsibilities were similar to those he had been performing for the past twenty years. Sullivan claims that Jon Tainow, who did the hiring for the position, told him that as far as he was concerned, Sullivan had the job but that Ken Bagley, Deputy Chief Executive Officer for the Northeast Corridor and a friend of Scott's, told Tainow to "take a good look" at another candidate, Mark Rose. Rose eventually got the position. Tainow, however, testified that he never told Sullivan that Sullivan had the job and that he hired Mark Rose as Director of Operations because of his administrative background and budget experience. Tainow further stated that the only role Bagley played in the hiring process was that Tainow and Bagley reviewed the list of candidates prior to Tainow's informing Bagley that he was going to hire Mark Rose. More importantly, Tainow testified that he only learned

of Sullivan's harassment complaint a week before the trial. Sullivan presented no evidence to rebut the testimony that the decisionmaker in this case was not aware of his complaint or to show that the reasons Sullivan was not hired were false.

Second, Sullivan claims he should have received the Product Line Director position because it also encompassed duties he had been performing for many years. Moreover, Dennis Hale, the successful candidate, had a marketing background which Sullivan maintains did not prepare him for the on-board services component of the job. Sullivan further claims that the decision about whom to interview was made "in conjunction" with John Stafford, Amtrak's Director of Human Resources, who knew of Sullivan's sexual harassment complaint. However, Allan Edelston, who did the hiring for the position, testified that he hired Dennis Hale for the Product Line Director position because of Hale's experience managing the Autotrain, Amtrak's flagship train. Although Stafford participated in the interview process, the decision was made by Edelston and Edelston testified that the first time he heard of Sullivan's sexual harassment complaint was in the Spring of 1996, over a year after he had filled the position. Again, there is no evidence in the record to rebut the testimony that the decisionmaker did not know of Sullivan's complaint or to show that Amtrak's reasons for hiring Hale were pretextual.

Third, Sullivan claims he should have received the Manager of Terminal Services positions, jobs for which he was not interviewed. Scott Weddle, who was hired for the Miami position, had held a lower position than Sullivan's prior to the reorganization. The New Orleans position went

to James Turngren, who had also held a position lower than Sullivan. In each case, Sullivan claims Stafford participated in the hiring process by pointing out what the interviewer should look for when selecting the person for the job. In response, Dennis Hale testified that he hired Scott Weddle for the Miami Service Manager job because of his training background in on-board service and because of his philosophy of integrating employees into the decision-making process, and because Hale considered him the best qualified applicant for the job.[3] He further testified that he only learned of Sullivan's sexual harassment complaint in late 1996. Sullivan presented no evidence to rebut Hale's asserted ignorance of the complaint or to show that the reasons Hale proffered for selecting Weddle over Sullivan were false. And, while Charles Bothwell did not testify directly as to why Turngren got the New Orleans job over Sullivan, he testified in a deposition read at trial that at a General Managers meeting he attended following the reorganization, several people raised questions as to Sullivan's integrity and honesty. Those concerns stemmed from their belief that Sullivan gave false reasons for requesting a transfer to Miami from New York, and from his attempts to get his wife a position in Miami in violation of the company's nepotism policy. John Stafford also testified that at that meeting Scott recommended Sullivan for several open management positions but that questions were raised about Sullivan's performance ratings and about

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3. There is some discrepancy in the record as to who got this position. Hale testified at trial that the position went to Weddle. However, Stafford, in his deposition, states that the job went to J. MacArthur. In either case, Sullivan presented no evidence to show that the hiring decision was made for retaliatory reasons.

his integrity stemming from his attempt to get his wife hired in Miami.[4]

Finally, Sullivan claims that he, rather than John Coffe, should have gotten the Conventional Service Manager position. He argues that Coffe, who was not an Amtrak employee, was selected over him despite Amtrak's policy of hiring and promoting from within, and that Coffe's technical background with commuter railroads did not match Sullivan's qualifications for a position that dealt with food amenities and sleeper cars. According to Sullivan, David Nogar told him after their interview that he was at the head of the list of candidates, but Nogar then checked with some of Sullivan's previous supervisors and removed him from contention for the job. Sullivan also asserts that Nogar "reported to" Bagley and "knew" Scott. He further notes that each of the other district managers who lost their positions during the reorganization were subsequently rehired in management positions. In response, David Nogar testified that he chose Coffe, a man with whom he had worked previously, because of Coffe's customer service sensitivity and mechanical background. He denied checking with any of Sullivan's previous superiors or to knowing any more about his employment history than Sullivan listed on his

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4. Sullivan testified that he was aware that he had angered a number of people in management following his move to Miami. Margaret Leitereg, Amtrak's Human Resources Manager for the New York district until 1995, also testified that Stafford told her in January 1994, a month prior to Sullivan's lodging a complaint, that Sullivan would not wind up with a management position following the reorganization because he had alienated too many people in the years previous.

application. He further stated that he only learned of Sullivan's sexual harassment complaint a week prior to testifying at the trial. Sullivan again failed to rebut Nogar's stated ignorance of the harassment complaint.

When an employer offers legitimate reasons for its actions, as Amtrak did, the presumption of retaliation disappears. The plaintiff then bears the burden of showing that the employer's reasons for not promoting him were pretextual. Sullivan has not borne that burden. He failed to introduce any evidence that would have permitted the jury to legitimately draw the inference that the reasons proffered by Amtrak for Sullivan not getting these jobs were false and that the real reason was retaliation. We recognize that circumstantial evidence can suffice to support inferences that retaliation was the reason for the adverse action. In this case, however, the evidence presented is far too speculative to support the jury's conclusion that Amtrak retaliated against Sullivan by not promoting him to any of the management jobs for which he applied following his demotion.

Accordingly, we **REVERSE** the judgment of the district court and **REMAND** the case for entry of judgment on behalf of Amtrak.[5]

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5. Because we reverse on the retaliation claims, we need not address the issue of whether the damage amount was appropriate.

Appendix A

United States Court of Appeals
For the Eleventh Circuit

No. 98-4080

District Court No. 95-0037-CV

BARRY T. SULLIVAN,

Plaintiff-Appellee,

versus

NATIONAL RAILROAD PASSENGER CORPORATION, a foreign corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

Before COX and BARKETT, Circuit Judges, and FAY, Senior Circuit Judge.

JUDGMENT

This cause came to be beard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the

said District Court in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for entry of judgment on behalf of Amtrak;

It is further ordered that plaintiff-appellee pay to defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

Entered: March 26, 1999
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: **JUN 17 1999**

APPENDIX B — ORDER AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED DECEMBER 8, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-00037-CIV-GRAHAM
MAGISTRATE JUDGE GARBER

BARRY T. SULLIVAN,

Plaintiff,

v.

NATIONAL RAILROAD
PASSENGER CORPORATION,

Defendant.

ORDER

Barry T. Sullivan ("Sullivan") brought an action against the National Railroad Passenger Corporation ("Amtrak") for *quid pro quo* sexual harassment and retaliation pursuant to Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991. A jury trial was held on May 27, 1997, and the jury returned a verdict in favor of Amtrak as to the sexual harassment claim. However, the jury found for Sullivan as to the retaliation claim and awarded compensatory damages in the amount of $50,000.

Appendix B

A jury's determination in a Title VII action is limited to the award of compensatory and, if warranted, punitive damages. 42 U.S.C. § 1981(a)(c). The Civil Rights Act of 1991 conclusively establishes that compensatory damages do not include backpay, interest on backpay, or any other type of relief authorized under § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g). *See* 42 U.S.C. § 1981a. Compensatory and punitive damages are in addition to, not in lieu of or duplicative of, equitable remedies allowed under prior law. *Landgraf v. U.S.I. Film Products*, 511 U.S. 244 (1994). Sullivan has requested that this Court award equitable damages in the form of back pay, reinstatement or in lieu thereof, front pay, and injunctive relief. Accordingly, this Court held an equitable damages hearing on September 17, 1997.

FINDINGS

The first issue that must be resolved by this Court is what actions by Amtrak provide the basis for an award of equitable damages. Sullivan maintains that he is entitled to equitable damages from the date that he was demoted from a management position during the reorganization of Amtrak in January of 1994. Amtrak maintains that Sullivan's demotion from the management position cannot possibly serve as the basis for an award of equitable damages because the demotion occurred prior to the lodging of the complaint in February of 1994.

This Court finds that the appropriate starting point for determining what damages Sullivan is entitled to is the date on which he complained to Amtrak officials about Kevin

Scott's alleged sexual proposition. *See Speer v. Rand McNally & Company*, 1996 WL 667810 *8 n.4 (N.D. Ill. 1996) (holding that a plaintiff's refusal of sexual advances, in and of itself, is not the type of protected activity which is properly the source of a Title VII retaliation claim); *Castillo v. Pathmark Stores*, 941 F.Supp. 437 (S.D.N.Y. 1996) (stating that even the broadest interpretation of a retaliation claim cannot encompass instances where the alleged protected activity consists simply of declining a harasser's sexual advances, even if the advances were made by an immediate supervisor); *Cf. Little v. United Technologies*, 103 F.3d 956, 958 (11th Cir. 1997) (holding that the expression of opposition to a single comment by one co-worker to another cannot constitute opposition of an unlawful employment practice). An award of equitable damages cannot be premised on any actions that occurred prior to the date that Sullivan complained to Amtrak, through his attorney, about Kevin Scott's harassing conduct. Any award of equitable damages must be based on actions that Amtrak took against Sullivan after February of 1994.

A review of the record reveals that Amtrak took several retaliatory actions against Sullivan after he lodged his complaint. The record indicates that Amtrak:

(a) changed Sullivan's yard chief position from a four-day a week job to a five-day a week job;

(b) eliminated Sullivan's yard chief position and placed him in a chief of on-board service position that required increased travel time;

(c) investigated Sullivan for alleged misuse of company-owned cellular phone and theft of gift certificates;

(d) failed to promote Sullivan to any one of four management positions that he applied for and was qualified to hold.

The basic purpose of Title VII relief is to "make whole" victims of unlawful employment discrimination. *Darnell v. City of Jasper, Alabama*, 730 F.2d 653, 655 (11th Cir. 1984); *Albermarle Paper Company v. Moody*, 422 U.S. 405, 418 (1975); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976). The issue that arises is whether Sullivan is entitled to an award of equitable damages based on Amtrak's failure to promote him to the management positions that he applied for after lodging his sexual harassment complaint. Amtrak maintains that the mere fact that Sullivan applied for management positions and was denied promotion after lodging his sexual harassment complaint is insufficient grounds upon which to award equitable damages. Amtrak maintains that the individuals who rejected Sullivan for the positions for which he applied had no knowledge of his complaint. This Court finds that the mere fact that the actual decision makers may not have had knowledge of Sullivan's complaint does not preclude the award of equitable damages. Sullivan's complaint was common knowledge amongst Amtrak management, and individuals who rejected Sullivan's application for promotion were part of management. Additionally, Sullivan's employment history also indicates that Amtrak's rejection of his applications for promotion to management were in all likelihood retaliatory

in nature. The evidence presented during the jury trial indicates that Sullivan was employed by Amtrak at the management level since 1974. He was a competent employee who received both average and above-average performance evaluations. Sullivan was promoted several times throughout his career and was only demoted once at his own request. The evidence further showed that Sullivan was qualified for the management positions that he applied for after complaining about Keith Scott's sexual proposition. In light of the foregoing facts it is evident that but for Sullivan's complaint of sexual harassment, he would have been selected for one of the four management positions for which he applied. Therefore, this Court concludes that Amtrak's failure to promote Sullivan to any of the positions he applied for after lodging his complaint, provides a sufficient basis for the award of equitable damages.

Sullivan has requested that this Court reinstate him to a management position at Amtrak. This Court finds, however, that reinstatement is not appropriate in this case. Amtrak management's prior conduct leads this Court to believe that if Sullivan were returned to a management position he would be subject to a hostile atmosphere. *See e.g. Fitzgerald v. Sirloins Stockade*, 624 F.2d 945, 957 (10th Cir. 1980) (finding that front pay was an appropriate remedy where as a result of the employer's retaliatory action it was improbable that there could be a warm employer-employee relationship); *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 358 (5th Cir. 1977) (holding that in light of the employer's long term resistance to equal employment, an award of front pay may be mandated). Therefore, this Court finds that front pay is warranted in this case.

Appendix B

Sullivan called Jeffrey Koch, a damage expert, to testify with respect to the damages that he incurred as a result of Amtrak's retaliatory actions. Jeffrey Koch provided the Court with various damage scenarios based upon the management positions that Sullivan had applied for but had been unable to obtain. Amtrak cross-examined Mr. Koch with respect to his calculations but did not present any damage testimony of its own. After hearing the testimony and reviewing the exhibits, this Court finds that Mr. Koch's calculations are, for the most part, accurate and reasonable. The only troublesome aspect of Mr. Koch's analyses is that he utilized age 80 as Sullivan's estimated time of death instead of the national average listed in the I.R.S. life expectancy tables of 75.5. *See* Equitable Damages Trial Transcript at p. 46. Therefore, this Court recalculated the damage estimates utilizing 75 as the anticipated age of death.

Mr. Koch submitted estimated lost back and future pay with respect to the four management positions that Sullivan applied for. Koch provided four different calculations for each position based on potential salary ranges. As indicated *supra*, Sullivan received average and above average performance reviews and was in general a competent employee. Accordingly, this Court finds that the appropriate salary range upon which to base Sullivan's award of back and front pay is "average." Additionally, this Court finds that Sullivan's equitable damages award should be based upon the first management job that he applied for. The evidence submitted indicates that he was qualified for that job. That fact in conjunction with the jury's finding of retaliation leads this Court to believe that but for Sullivan's complaint he would have, in all likelihood, been promoted to that position.

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Based upon the foregoing, it is hereby

ORDERED that Barry T. Sullivan shall be awarded backpay in the amount of $ 96,783.00 with prejudgment and post-judgment interest calculated by 6.5%, and front pay in the amount of $458,166.00. Amtrak shall also be enjoined from engaging in any future retaliatory action against Sullivan. Said award and other relief shall be set forth in a separate Final Judgment.

DONE AND ORDERED in Chambers at Miami, Florida this 8th day of December, 1997.

s/ Barry L. Garber
BARRY L. GARBER
UNITED STATES MAGISTRATE JUDGE

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 95-00037-CV-GRAHAM
MAGISTRATE JUDGE GARBER

BARRY T. SULLIVAN,

Plaintiff,

v.

NATIONAL RAILROAD
PASSENGER CORPORATION,

Defendant.

FINAL JUDGMENT

THIS CAUSE was before this Court for trial by jury on May 27, 1997, by Order of Reference and consent of the parties pursuant to 28 U.S.C. § 636(c) and Rule 73 of the Federal Rules of Civil Procedure. The jury rendered a verdict in favor of Plaintiff Barry T. Sullivan on the retaliation count, and in favor of Defendant National Railroad Passenger Corporation as to the *quid pro quo* sexual harassment count. This Court also held a hearing on equitable damages on September 17, 1997. The issues having been duly heard, this Court hereby enters Final Judgment in favor of Plaintiff Barry T. Sullivan and against Defendant National Railroad Passenger Corporation.

Accordingly, it is hereby ORDERED and ADJUDGED as follows:

1. Judgment is hereby entered for Plaintiff Barry T. Sullivan in the amount of $50,000 in compensatory damages;

2. Plaintiff Barry T. Sullivan is awarded judgment against Defendant National Railroad Passenger Corporation for backpay in the amount of $96,783.00 together with prejudgment and post-judgment interest calculated at 6.5%, and front pay in the amount of $458,166.00;

3. The National Railroad Passenger Corporation is enjoined from engaging in any future retaliatory action against Barry T. Sullivan; and

4. This Court retains jurisdiction for any award of attorney's fees, and taxation of costs and expenses recoverable as a matter of law.

DONE AND ORDERED in Chambers at Miami, Florida this 8th day of December, 1997.

s/ Barry L. Garber
BARRY L. GARBER
UNITED STATES MAGISTRATE JUDGE

APPENDIX C — VERDICT FORM DATED JUNE 3, 1997 AND FILED JUNE 16, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-00037-CIV-GRAHAM
Magistrate Judge GARBER

BARRY T. SULLIVAN,

Plaintiff

v.

NATIONAL RAILROAD
PASSENGER CORPORATION,

Defendant.

VERDICT FORM

1. Do you find that Amtrak engaged in quid pro quo sexual harassment again Sullivan because Mr. Sullivan rejected the alleged sexual proposition of Kevin Scott?

Yes ___

No X

If you answered "Yes" to QUESTION 1, then your verdict is for Barry Sullivan on his claim for sexual harassment and regardless of how you answer the remaining QUESTIONS, you must answer Questions 3 and 4 as to damages.

In either case, you should now answer Question 2.

Appendix C

2. Do you find that Amtrak retaliated against Barry Sullivan because he made a legitimate, good faith complaint that Kevin Scott had sexually propositioned him and that his rejection of Mr. Scott's proposition resulted in loss of his management position and future advancement opportunities?

Yes X

No ___

If you answered "Yes" to Question 2, then your verdict for Barry Sullivan on his retaliation claims under Federal and State law and you should answer Question 3 and 4 as to damages.

3. Total amount compensatory damages to Barry Sullivan $50,000.00.

4. Total amount of punitive damages to Barry Sullivan is $ – 0 –.

SO SAY WE ALL THIS 3 DAY OF JUNE, 1997.

s/ [illegible]
JURY FOREPERSON

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 3, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-4080

BARRY T. SULLIVAN,

Plaintiff-Appellee,

versus

NATIONAL RAILROAD PASSENGER CORPORATION, a foreign Corporation,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: COX and BARKETT, Circuit Judges, and FAY, Senior Circuit Judge.

Appendix D

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
SEP 30 1999
OFFICE OF THE CLERK

No. 99-379

IN THE

Supreme Court of the United States

BARRY T. SULLIVAN

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Respondent National Railroad Passenger Corporation, also known as Amtrak, has no corporate affiliates.

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STATEMENT OF THE CASE

This brief is respectfully submitted on behalf of the National Railroad Passenger Corporation ("respondent" or "Amtrak") in response to the petition of Barry T. Sullivan ("petitioner" or "Sullivan"), which seeks review of the Eleventh Circuit's Opinion and Judgment dated March 25, 1999 (the "Opinion and Judgment"). The Opinion and Judgment reversed the judgment for petitioner entered by the District Court based on petitioner's claim of unlawful retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) *et. seq.*, the Civil Rights Act of 1991, 42 U.S.C. §1981(a), and the Florida Whistle Blower's Protection Act, Florida Stat. Ann. §448.102(3) (West 1998) (the "Retaliation Claim"), and remanded the case to the District Court for entry of judgment of dismissal on behalf of Amtrak. App. 1a-12a.

The Eleventh Circuit's Opinion and Judgment, contrary to petitioner's contention, does not reflect a conflict involving the Eleventh Circuit and other Circuit Courts of Appeal on an issue of law. *Compare* Pet. 8-17 *with* App. 6a-12a. Nor does it reflect the Eleventh Circuit's adoption of a so-called "pretext plus" burden of proof. *Id.* The Opinion and Judgment simply reflects the Eleventh Circuit's correct conclusion, based on a thorough review of the record, that viewing the evidence in a light most favorable to petitioner, there was insufficient probative evidence to support petitioner's Retaliation Claim. App. 6a-12a. There is no cause for this Court to review what amounts to a factbound argument concerning the evidentiary record below.

A. Facts Ignored by Petitioner.

To justify his petition to this Court, petitioner either ignores completely or lightly skips over indisputable evidence that demonstrates why the Eleventh Circuit's Opinion and Judgment was correctly decided.

In January 1994, well before petitioner first made the complaint which forms the sole basis for his Retaliation Claim, petitioner lost his management position as District Manager of Passenger Services in Miami, when the position was abolished as part of a nationwide reorganization by Amtrak. App. 3a. After the reorganization, petitioner exercised his union seniority and displaced a more junior employee in a non-management position of Yard Chief in Miami. *See* App. 3a; R5-110-79-82.[1]

The record evidence reveals that even before this January 1994 reorganization, petitioner had alienated many people in Amtrak management because of his questionable conduct. App. 11a., n. 4. Years earlier, when he was stationed in New York, Sullivan had engaged in an extra-marital affair with an Amtrak employee whom he was supervising at the time. R5-111-145-46,150; R5-112-218-20. Thereafter, in 1987, Sullivan voluntarily accepted a demotion in order to transfer to a management position in Miami, ostensibly to care for his ailing mother and to reconcile with his wife. App. 10a; R5-110-13-14, 30-32; R5-112-433-34; R5-113-147-48. After relocating, however, petitioner divorced his first wife and married the Amtrak employee he formerly supervised; this led Amtrak management officials to conclude that he had misled them concerning his professed reasons for relocating to Miami and to seriously question his integrity. App. 10a; R5-111-146; R5-112-191, 220-21, 249-51, 256-57, 280-84, 372-73, 433-34; R5-113-110-113, 147-48. Integrity concerns were further

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[1] "R" refers to the record on appeal in the Eleventh Circuit.

heightened because of a belief that while he served as District Manager in Miami, Sullivan had engaged in inappropriate nepotism on behalf of his former subordinate/now wife. App. 10a; R5-112-195-198, 212, 216-18, 296-97, 302-05; R5-113-113-14, 139-41.

By the time of the January 1994 reorganization, individuals in Amtrak management were openly questioning petitioner's honesty and integrity. *See* App. 10a-11a. Indeed, plaintiff was forced to admit at trial that he was well aware he had angered people in connection with his earlier move to Miami. App. 11a, n. 4.

In addition, in the first half of February 1994, shortly after the reorganization, Amtrak opened an investigation into petitioner's misuse of Publix's gift certificate and an Amtrak cellular phone. App. 3a. Petitioner could not account for eight missing certificates, which had been cashed at a grocery store near his home. *Id.* Moreover, petitioner admitted to making, along with his wife, over $1,000 worth of unauthorized calls on the company phone. *Id.* Despite this evidence, Amtrak ultimately took no formal action against petitioner regarding either the certificates or the phone. *Id.*

In mid-February 1994, after he had lost his management position through reorganization and after Amtrak had commenced an investigation concerning his misuse of company property, petitioner for the very first time lodged the complaint that underlies his Retaliation Claim. App. 3a. Acting through an attorney, who communicated with Amtrak attorneys in Washington, D.C., petitioner charged that in late December 1993, before the reorganization, petitioner had been the victim of a homosexual advance by his then immediate supervisor at the end of a day in which the two had been traveling together on business. App. 2a-3a; R5-112-331-31. Petitioner's attorney invited Amtrak to work out a settlement of this charge. R5-112-331-33, 347-49.

Petitioner's charge was completely uncorroborated: the two men were allegedly alone when the purported incident happened in a hotel parking garage. *See* App. 2a. Moreover, there was no evidence -- offered either to Amtrak in 1994 or subsequently at trial in 1997 -- that the supervisor had ever before been accused of, let alone found to have committed, a single act of sexual indiscretion with anyone, male or female. Amtrak investigated petitioner's uncorroborated charge of sexual harassment and concluded that it was baseless. App. 3a.

Four months after Sullivan made his charge, in June 1994, petitioner's work schedule as Yard Chief in Miami was changed from four days to five days so that Amtrak could comply with an FDA requirement concerning inspection and cleaning of inbound trains. App. 3a. The next month, in July 1994, all Yard Chief positions were eliminated by Amtrak nationwide due to budget constraints, after which petitioner again exercised his union's seniority and assumed a position as Chief On Board Service. App. 3a.

At the trial of this action,[2] petitioner, over Amtrak's objection, was allowed to submit evidence and argue to the jury that Amtrak's investigation concerning petitioner's misuse of company property, the changing of petitioner's work schedule as Yard Chief and Amtrak's subsequent elimination of his Yard Chief position all constituted unlawful retaliatory acts by Amtrak, actions purportedly motivated by the sexual harassment complaint he had lodged in mid-February 1994. App. 4a, 7a.

Yet, by the time this case was heard on appeal to the Eleventh Circuit, petitioner was forced to concede that Amtrak's investigation could not be considered retaliatory

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[2] The case was tried to a jury before U.S. Magistrate Judge Barry L. Garber of the United States District Court for the Southern District of Florida. App. 4a, 22a-23a.

because it pre-dated his sexual harassment complaint. App. 7a.[3] The Eleventh Circuit also found no evidentiary basis for petitioner's contention that Amtrak's actions when petitioner was Yard Chief were retaliatory, rather than legitimate, non-pre-textual business decisions. App. 7a-8a. Notably, in his petition to this Court, petitioner does not -- and cannot -- dispute the Eleventh Circuit's conclusions that *none* of the foregoing actions by Amtrak in 1994 were in any way retaliatory, even though he had succeeded in taking precisely that position in the District Court.

In his petition to this Court, petitioner is now left to complain about Amtrak's failure to select him for various management level positions for which he applied at least *one year* after his sexual harassment complaint was lodged. Pet. 3, 4-6. Although petitioner at one time or another has complained about Amtrak's failure to select him for at least five different management positions he applied for in 1995 (App. 3a-4a; Pet. 3-4), Sullivan now argues to this Court that the Eleventh Circuit committed an important legal error based simply on his purported evidence of retaliation relating to only three of those jobs. Pet. 4-6. As respects these three positions, petitioner does not profess to offer any direct evidence of a retaliatory motive by Amtrak. *See id.* He relies solely on what can only charitably be described as "indirect" (*i.e.*, circumstantial) evidence.

Sullivan claims that retaliation explains his failure to be selected for the position of Product Manager-Atlantic Services, for which he applied in March 1995. Pet. 4-5; App. 3a-4a, 9a. But the record reflects that the actual decision-maker was Allan

---

[3] As the Eleventh Circuit's Opinion and Judgment notes, petitioner also initially tried to contend in the District Court that even his January 1994 demotion from the position of District Manager of Passenger Services in Miami was retaliatory, even though it too plainly pre-dated his sexual harassment charge. App. 7a.

Edelston, who testified that he first heard about petitioner's sexual harassment complaint a year *after* he decided to fill the position by selecting another Amtrak employee named Dennis Hale.[4] App. 9a; R5-113-38. Moreover, Mr. Edelston explained under oath at trial that he had chosen Mr. Hale because of his experience managing the company's Autotrain, Amtrak's flagship train. App. 9a; R5-113-33-35. Petitioner does not cite evidence indicating that Mr. Hale was unqualified for the position. On the contrary, Sullivan's petition can do no better than cite to Sullivan's own self-serving testimony at trial as to why he might have been better qualified than Mr. Hale for the Product Manager position. *See* Pet. 5; R5-110-120-23.

As for the Service Manager position in Miami (App. 4a), the record reflects that the actual decision-maker was Dennis Hale. App. 10a. Like Mr. Edelston, Mr. Hale testified at trial that he was not aware of petitioner's sexual harassment complaint until late 1996, long after he hired Scott Weddle for the Service Manager job. App. 10a; R5-113-55-56. Mr. Hale testified that he hired Mr. Weddle because of his training background in on-board service and his philosophy of integrating his employees into the decision-making process; Mr. Hale considered Weddle the best qualified applicant for the job. App. 10a; R5-113-50-55. Once again, Sullivan's petition offers no evidence that Mr. Weddle was unqualified for the

---

[4] Sullivan now professes to find evidence that Allan Edelston knew about Sullivan's harassment charge before he chose Mr. Hale to fill the Product Manager position (Pet. 4-5 and n. 2). Petitioner refers to testimony by Mr. Scott, the man charged with harassing Sullivan, which purportedly indicates Scott told "Stan" Edelston about the charge. *See* R5-114-70-72. But there is no testimony specifying *when* Scott supposedly did so. Not surprisingly, petitioner did not even rely on this purported evidence of Mr. Edelston's prior knowledge in his Answer Brief to the Eleventh Circuit. *Compare* Pet. at 4-5 and n. 2, citing, R12-158-70-72 *with* Answer Brief to Eleventh Circuit 11 and 31-32, which does not argue that Edelston had prior knowledge.

Service Manager job.[5]

Finally, as respects the New Orleans Manager of Terminal Services position, for which Sullivan applied in May 1995 (App. 4a), petitioner stresses that Charles Bothwell -- unlike the other decision makers -- was previously aware of Sullivan's charge. Pet. 5. But petitioner fails to acknowledge that *before* Sullivan first lodged his complaint, Mr. Bothwell *also* was aware of the serious doubts entertained by management employees concerning petitioner's lack of integrity. App. 10a. The evidence reflects that Boswell attended management meetings in January 1994 in which people raised "significant" concerns about petitioner's integrity. App. 10a-11a; R5-112-247, 249-51, 256-58, 280-84, 296-97, 302-05, 372-73; R5-113-110-15, 147-48. Once again, moreover, petitioner offers no evidence that the man Bothwell selected for the New Orleans Terminal Services position, James Turngren, was unqualified. Instead, petitioner lamely mentions that Mr. Turngren's position before he became Manager of Terminal Services was "lower" than the position Sullivan had held *before* the January 1994 reorganization, as if that fact somehow made Sullivan more qualified than Turngren 16 months later in May 1995. *See* Pet. 5.

B. Petitioner's Speculation About the Basis for the Jury's Verdict.

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[5] Petitioner also purports to point to evidence that Amtrak's Director of Human Resources, John Stafford, made the recommendation to hire Mr. Weddle. Pet. 5-6; citing R-9-146-136. *Compare* R5-112-319-21(Stafford testifies he made a recommendation but *Hale* made the decision). Once again, however, the evidence petitioner now relies on was not the evidence he cited to the Eleventh Circuit. *Compare* Pet. 5-6, citing R9-146-136 *with* Answer Brief to the Eleventh Circuit 12-13, citing R11-157-63. The Eleventh Circuit decision directly addressed the evidence upon which Sullivan relied below concerning this position. App. 10a.

Although the jury returned a verdict for petitioner on his Retaliation Claim, the District Court allowed petitioner to rely on not only Amtrak's failure to hire him for one of the three aforementioned management positions in 1995, but also Amtrak's February 1994 investigation concerning his misuse of company property, Amtrak's June 1994 decision to change his work hours as Yard Chief, and Amtrak's July 1994 decision to eliminate all Yard Chief positions nationwide, as well as Amtrak's decision not to select him for at least two other management level positions for which petitioner applied in 1995. App. 3a-4a, 7a-8a. Yet the jury made no special verdict findings indicating which particular adverse employment action or actions by Amtrak actually formed the basis for the jury's finding in favor of petitioner on his Retaliation Claim. Pet. 24a-25a. Petitioner, therefore, can only speculate that the jury actually found for him based on Amtrak's failure to select him for one of the specific three management positions cited in his petition. *See* Pet. 4, 18.

REASONS FOR DENYING THE WRIT

Petitioner is seeking review of a clearly *factbound* claim, which is that the Eleventh Circuit failed to give sufficient weight to the inferences petitioner would draw from his "indirect evidence" of alleged retaliatory conduct by Amtrak more than one year after he lodged a sexual harassment complaint. *See* Pet. 18. His attempt to argue that his petition concerns an important *legal* issue is simply belied by the record.

There is absolutely nothing in the Eleventh Circuit's Opinion and Judgment that can remotely be viewed as a misstatement of the applicable legal standards governing his Retaliation Claim. Moreover, petitioner's contention that the Eleventh Circuit applied a "pretext plus" burden of proof and that, by doing so, the Eleventh Circuit acted in conflict with numerous other Circuits (*see* Pet. 6-18), amounts to nothing

more than a mischaracterization of the Eleventh Circuit's decision. The Eleventh Circuit decision, on its face, simply concludes, quite correctly, that petitioner's meager "indirect" evidence of retaliation was legally insufficient to raise a triable issue of fact concerning retaliation. App. 12a.

Similarly erroneous is petitioner's contention that the Eleventh Circuit's Opinion and Judgment indicates the Circuit is "at best, internally split" on whether a case must be submitted for determination by the fact-finder whenever a plaintiff presents a *prima facie* case of discrimination and also evidence from which a fact-finder could reasonably reject defendant's explanation for its actions as a mere pretext for discrimination. *See* Pet. 10 and n. 5. There is nothing in the Opinion and Judgment itself even hinting at such a split. *See* App. 1a-12a. Moreover, petitioner made precisely this same "internal split" argument when he petitioned the Eleventh Circuit for rehearing or rehearing *en banc*. Sullivan Petition for Rehearing *En Banc* 5-15. The Eleventh Circuit found this contention so lacking in merit that the petition for rehearing was denied and no judge in regular service on the Eleventh Circuit requested that the Court be polled on the requested rehearing *en banc*. Pet. at 27a.[6]

The Eleventh Circuit's Opinion and Judgment simply and accurately lays out the applicable law. The decision correctly states that to make a *prima facie* case for retaliation, a plaintiff must show (1) a statutorily protected expression; (2) an adverse employment action; and (3) a causal link between

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[6] *See*, in this regard, *Arrington v. Cobb Co.*, 139 F.3d 865 (11th Cir. 1998), where the Eleventh Circuit unequivocally reaffirmed that any confusion on the subject of "pretext plus" engendered by a decision two years earlier in *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997) was later put to rest by subsequent Eleventh Circuit rulings. *Arrington*, 139 F.3d at 875 and n. 21.

the protected expression and the adverse action. App. 6a. The Eleventh Circuit properly observes that if (and only if) the plaintiff makes out a *prima facie* case of retaliation, then the burden shifts to the defendant to rebut the presumption of retaliation by producing legitimate reasons for the adverse employment action. App. 6a-7a. Moreover, the decision correctly concludes that once the defendant offers legitimate reasons, any presumption of retaliation simply disappears and the plaintiff must show that the employer's proffered reasons for taking the adverse action were actually a pretext for prohibited retaliatory action conduct. App. 7a.

The Eleventh Circuit's recitation of these applicable legal principles is entirely consistent with this Court's directives in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Nor can there be any dispute about the Eleventh Circuit's conclusion that, in this particular case, the key inquiry was whether petitioner's evidence sufficiently supported the third prong of his evidentiary burden -- the existence of a causal link between his protected expression and adverse action. Pet. 6a-7a.

It is only the petitioner, not the Eleventh Circuit, who contends that the Eleventh Circuit applied a "pretext plus" burden of proof to petitioner's Retaliation Claim with respect to this causation element. It is only the petitioner, not the Eleventh Circuit, who insists that the Court of Appeals obligated petitioner to present evidence above and beyond that which would suffice to satisfy both his *prima facie* retaliation case *and* his burden of adducing evidence from which the jury could reasonably find that the employer's explanations for its actions were merely pretextual and that a real motive was discrimination. On the contrary, the Eleventh Circuit Opinion and Judgment merely concludes that petitioner's purely circumstantial evidence was "far too speculative" to support the jury's conclusion that Amtrak retaliated against Sullivan. Pet.

at 12a.

In his petition, Sullivan never once squarely addresses the fact that the alleged adverse employment actions upon which he now relies took place more than one year after his sexual harassment complaint. Lower courts have repeatedly held, quite logically, that such a prolonged interval between a plaintiff's "protected" activity and the employer's adverse action cannot support any reasonable inference of causal connection. *See, e.g., Payne v. Milwaukee Co.*, 146 F.3d 430, 434 (7th Cir. 1998) (action 13 months after protected expression by plaintiff is too remote in time to make a *prima facie* case on the element of causal nexus); *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994) (10 months insufficient to support inference of retaliation); *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992) (six months too long to meet causal connection requirement); *Valdez v. Mercy Hospital*, 961 F.2d 1401, 1403 (8th Cir. 1992) (no retaliation where six months passed between the protected activity and the termination); *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50, 54 (6th Cir.), *cert. denied*, 478 U.S. 1006 (1986) (one year militates against finding of retaliation). *Compare Adusumilli v. City of Chicago*, 164 F.3d 353, 363 (7th Cir. 1998), *quoting Juarez v. Ameritech Mobile Communications*, 957 F.2d 317, 321 (7th Cir. 1992) (even suspicious timing, standing alone, does not create an issue of fact as to causal connection when plaintiff cannot prove termination was because of plaintiff's sexual harassment complaint rather than poor job performance).

Similarly, petitioner's evidence is woefully deficient on the issue of whether Amtrak offered pretextual justifications for its hiring selections in 1995. "Pretext" has been described by one lower court to mean "more than a mistake on the part of the employer; pretext means a lie, specifically a phony reason for some action." *Wolf v. Buss (America), Inc.*, 77 F.3d 914, 919 (7th Cir. 1996) (citation and internal quotes omitted). There

must be "such weaknesses, implausibilities, inconsistencies, incoherence, or contradictions in the employer's proffered legitimate reasons ... that a reasonable fact finder could rationally find them unworthy of credence." *Sheridan v. E.I. duPont de Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996 (en banc)), *cert. denied*, 521 U.S. 1129 (1997).

It is clearly not enough for a plaintiff like petitioner merely to insist that reasons given by an employer for its action are pretextual. That is because Title VII does not authorize a federal court to become a "super-personnel department that reexamines an entity's business decisions." *Barbour v. Browner*, 181 F.3d 1342, 1346 (D.C. Cir. 1999), *quoting Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987). A plaintiff thus "must do more than cast doubt on the rationale proffered by the employer; the evidence must be of such strength and quality as to permit a reasonable finding that the action was obviously or manifestly unsupported." *Shorette v. Rite Aid of Maine, Inc.*, 155 F.3d 8, 13 (1st Cir. 1998), *quoting Ruiz v. Posadas de San Juan Assocs.*, 124 F.3d 243, 248 (1st Cir. 1997). Plaintiff's evidence must be sufficiently probative to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action. *See, e.g., Scott v. University of Mississippi*, 148 F.3d 493, 512 (5th Cir. 1998); *Sheridan v. E.I. duPont deNemours & Co.*, 100 F.3d at 1067. When a plaintiff offers circumstantial -- rather than direct -- evidence on the issue of pretext, the evidence should be "specific" and "substantial" in order to create a triable issue as to whether the employer intended to discriminate. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998).

In this case, the meager circumstantial evidence offered by petitioner in an effort to meet his burden was plainly inadequate. Only an advocate, not a reasonable factfinder, could find that Amtrak's reasons for not selecting Sullivan for three management positions more than one year after he lodged

his sexual harassment complaint amounted to a mere "pretext" for retaliation. As the Eleventh Circuit concluded, petitioner's evidence was "far too speculative" to support his Retaliation Claim. Pet. 12a.

Finally, petitioner engages in sheer conjecture when he argues that the Eleventh Circuit's Opinion and Judgment "disregards the fact that the jury rejected Amtrak's proffered reasons for not promoting Sullivan in favor of Sullivan's evidence against that reason, either because the jury found that the real reason was retaliation or because Sullivan's evidence caused them to disbelieve Amtrak's given reason." Pet. 18. The jury may have found for petitioner on his Retaliation Claim below. But it made no special findings that would enable petitioner -- or anyone else -- to conclude that the jury rejected Amtrak's reasons for not selecting Sullivan for the three particular positions on which he now relies in his petition. *See* App. 24a-25a. Moreover, it is indisputable that the jury was wrongly subjected to petitioner's evidence and arguments that Amtrak had engaged in a host of other purportedly retaliatory acts -- concerning Amtrak's 1994 misuse of company property investigation and its 1994 Yard Chief decisions, to say nothing of two other 1995 hiring decisions that petitioner does not even challenge in his petition. It is now beyond dispute that these other actions by Amtrak were not, as a matter of law, a proper basis for Sullivan's Retaliation Claim. App. 3a-4a, 7a-9a, 11a-12a, 24a-25a.

The Supreme Court of the United States does "not grant a certiorari to review evidence and discuss specific facts." *U.S. v. Johnston*, 268 U.S. 220, 227, (1925) (Holmes, J.). The "Court's review ... is discretionary and depends on numerous factors other than the perceived correctness of the judgment [the Court] is asked to review.'" *Superintendent, Mass. Correctional Inst. v. Hill*, 472 U.S. 445, 460, 105 S.Ct. 2768, 2776 (1985) (Stevens, J., concurring in part and dissenting in part), *quoting Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974). *See also*

General Talking Pictures v. Western Electric Co., 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it").

Petitioner professes to find important legal issues and a conflict among the Circuits buried in an Eleventh Circuit Opinion and Judgment that thoroughly reviews the record evidence and concludes -- quite correctly -- that petitioner failed to adduce sufficient probative evidence to support his claim. The petitioner's argument "cannot obscure the truth that all that is involved [in this case] is an appraisal of the fair inferences to be drawn from the evidence." *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 455-456 (1959) (Frankfurter, J., dissenting).

In sum, the decision of the Court of Appeals need not and should not be the subject of further judicial review by this Court.

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be denied.

Dated: September 30, 1999

Respectfully submitted,

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